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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GERTRUDE GREEN, as Administratrix of the Estate of Sol Green and Individually,

Petitioner,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, a Delaware Corporation, and CANTWELL & CANTWELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether an Illinois resident consumer may collaterally challenge the enforcement in Illinois of a default California judgment which patently violated *BMW v. Gore*, by its awarding $50,000 punitive damages on $4,000 alleged actual damages on a consumer credit card debt, obtained by default by a nationwide financial services company in a California state court and registered by default in Illinois, where the Illinois resident consumer, who was elderly and poor, lacked the resources to defend in the distant forum the alleged debt asserted on forged documents against her deceased husband.

RULE 14(b) LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Plaintiff: Gertrude Green, as Administratrix of the Estate of Sol Green and Individually

Defendants: Merrill Lynch, Pierce Fenner & Smith, Inc. and Cantwell & Cantwell

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OPINIONS BELOW

On January 26, 1998, the Cook County Circuit Court of Illinois granted Defendants-Respondent's, Merrill Lynch, Pierce Fenner & Smith ("Merrill Lynch") and Cantwell & Cantwell ("Cantwell") (collectively, "Defendants" or "Respondents"), Motion to Dismiss. (App. B). Mrs. Green filed a motion for reconsideration, which the Circuit Court denied on September 8, 1998.

On October 6, 1998, Mrs. Green filed a Notice of Appeal with the Illinois Appellate Court, First District. On April 20, 2000, the Appellate Court issued its Order and Memorandum Opinion (App. A) which affirmed the final judgment of the Circuit Court. On May 11, 2000, Mrs. Green, acting *pro se*, filed a petition for rehearing with the Appellate Court, which was thereafter denied on June 8, 2000.

Petitioner's timely petition to the Illinois Supreme Court for Leave to Appeal was denied on January 29, 2001. (App. C).

STATEMENT OF JURISDICTION

Jurisdiction for review by this court is based on 28 U.S.C. § 1257(a) to review a final judgment by the highest court of a State in which a decision could be had, where a right (here, due process) is claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution; Article 4, Section 1:

> Full faith and credit shall be given in each state to the . . . judicial proceedings of every other state.

United States Constitution, Fifth Amendment:

> No person shall . . . be deprived of . . . property, without due process of law. . . .

STATEMENT OF THE CASE

Petitioner's case arises from Merrill Lynch's initiation and prosecution of claims against Sol Green in California, obtaining a default judgment against him for $4,000 (four thousand dollars) for alleged actual damages plus $50,000 (fifty thousand dollars) punitive damages, followed by Merrill's subsequent registration and enforcement of that judgment in Illinois, also by default, and successfully asserting res judicata and full faith & credit to preclude Green's widow from collaterally challenging the judgment being enforced.

I. The California Suit

On December 3, 1987, Robert Green, Sol Green's nephew, president of a corporation doing business in California known as Moving Up International Corp. ("Moving Up"), and an unidentified person, applied to open money market accounts for Moving Up with a Merrill Lynch

office in San Diego. (Complaint ¶12, RC.5).[1] Each account agreement provided for the issuance of VISA cards, and upon the request of Robert Green, without Sol Green's knowledge, VISA cards were issued in the names of Robert Green and Sol Green (Complaint ¶¶12-13, RC.5-6). At that time, the unidentified individual was allowed, also without Sol Green's knowledge, to sign the name of Sol Green on the application form (Complaint ¶13, RC. 5).

As the money market accounts became overdrawn in early 1988, Robert Green, Alison J. Boyd, another officer of Moving Up, and others, not including Sol Green, had several conversations with Merrill Lynch regarding those accounts. (Complaint ¶14, RC.6). During those conversations, Merrill Lynch was expressly informed that Sol Green had resigned from Moving Up over a year earlier, in October of 1986, that his signature had been forged on the account agreements, that he had no knowledge that the accounts existed, and, further, that he never used the accounts or the VISA cards. (Complaint ¶14, RC.6). Nevertheless, Merrill Lynch commenced an action in California against Moving Up, Robert Green, Alison Boyd, Sol Green and two other individuals, alleging that the Merrill Lynch accounts were overdrawn by $20,450 and that the VISA cards had an outstanding balance of $4,233.89 (the "California Suit") (Complaint ¶¶17-18, RC.7 and 23). The California Suit allegations of Sol Green's involvement in Moving Up and the overdrawn accounts were made on information and belief and not supported by any evidentiary material. In fact, throughout this period of time Sol Green was battling severe

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1. Petitioner's Verified Complaint is cited herein as "Complaint ¶ __". The record on appeal to the Illinois Appellate Court is cited herein as "RC. __".

illness and was spending a great deal of time in hospitals and visiting doctors. (RC. 701-710).

Nonetheless, Merrill Lynch still attempted to effect service on Sol Green by directing a process server to an apartment in San Diego, although, Merrill Lynch knew that Sol Green never resided at that address. (Complaint ¶19, RC.8-9). In fact, at the time Merrill Lynch filed the California Suit it had in its possession the Articles of Incorporation and By-Laws of Moving Up indicating that Sol Green's address was 1322 Seward Street, Evanston, Illinois (Complaint ¶20, RC.8). Having failed to effect personal service upon Sol Green, Merrill Lynch attempted service at Sol Green's "usual place of business" by directing a process server to the office of Moving Up despite possessing the specific knowledge that Sol Green had resigned from Moving Up over a year earlier and that the office was closed almost one month before Merrill Lynch claimed to have effected service (Complaint ¶21, RC.8).

On November 14, 1988, Merrill Lynch nonetheless sought and obtained a California court default judgment entitling Merrill Lynch to collect *$84,955.19* from Moving Up, Robert Green, Sol Green, Alison Boyd and others, on the alleged $20,450 overdrawn money market account and the $4,233.89 credit card debt (the "California Default Judgment"). (App. E). The California default judgment included an award of $50,000 in punitive damages and approximately $10,000 in attorneys' fees and costs (Complaint ¶22, RC. 8 and 47). (App. E at 23a and 25a). Despite Sol Green's sole specific act of involvement, as alleged in Defendant's California Suit, being merely providing his signature on the account agreements, which Alison Boyd and Mrs. Green contend in sworn affidavits

were forged, the full amount of the default judgment was eventually only enforced against Sol Green (RC.162).

Moreover, the allegations contained in the California Suit on their face showed Sol Green to be liable only for the $4,233.89 credit card debt. (RC.526-546). The money market accounts overdrawn by $20,450 were strictly a corporate obligation and the California Suit did not contain allegations to show why the corporate veil should be pierced in order to hold Sol Green personally liable. In fact, the trial court below acknowledged that the only claim Sol Green may have been liable for was the $4,000 credit card claim. (RC.43-44, 58).

II. Registration in Illinois of the California Default Judgment

After obtaining the default judgment in the California Suit, Merrill Lynch then contacted Respondent Cantwell to register the judgment in Illinois. On August 3, 1989, Cantwell, on behalf of Merrill Lynch, filed a Citation to Discover Assets on Sol Green. (Complaint ¶26, RC.10). The Citation to Discover Assets notice commanded Sol Green to appear before Judge Irwin Cohen on September 1, 1989 to discover assets not exempt from the enforcement of a judgment purportedly entered on August 2, 1989. Importantly for this petition, no judgment had been registered or entered in Illinois against Sol Green either on or prior to August 2, 1989. In fact, the Petition to Register the default judgment in the California Suit was not filed in Illinois until August 3, 1989, the same day the Citation to Discover Assets was filed. Moreover, under Illinois law, it was improper for Respondents to pursue a Citation to Discover Assets, a supplemental proceeding, before entry of an enforceable judgment.

At this time, Sol Green was seriously ill and mentally infirm (he died five months later, on January 12, 1990). Consequently, Sol Green's family was in some measure of disarray. On August 8, 1989, both the Petition to Register Foreign Judgment and the Citation to Discover Assets were served by substitute service of process. (Complaint ¶24, RC.9).

Because Sol Green was bedridden and seriously ill, Claire Fischer, Sol Green's sister-in-law, appeared on September 1, 1989, and checked in with the clerk (RC.680-1). It has since been determined that the September 1, 1989, hearing related only to the improperly scheduled Citation to Discover Assets, not the Petition to Register the Foreign Judgment. At that hearing, a new hearing date of October 3, 1989, was set (RC.681). At no time was Claire informed that a Rule to Show Cause relating to the Citation to Discover Assets was to issue (RC.681). Indeed, Claire was never provided with a copy of the Order entered at that hearing. Mrs. Green later discovered that the Merrill Lynch attorney wrote the following on that Order: "Defendant having been served by substitute service on August 8, 1989, and not appearing [. . .]" (RC.681). The Order also indicated that a Rule to Show Cause should issue against Sol although Claire was not advised that a Rule to Show Cause would be issued.

Claire left the September 1, 1989 hearing having been led to believe that no action would be taken regarding the registration of the California Default Judgment until October 3, 1989. In the interim, on September 11, 1989, Merrill Lynch filed a "Special Motion for Entry of Default Judgment" with a hearing scheduled for September 18, 1989. While Cantwell signed a Notice of Motion indicating that this motion had

been served on Sol Green by mail at his Evanston home, no member of the Green family ever saw that motion in advance of the hearing. (RC. 681).

On September 18, 1989, no member of the Green family appeared at the Special Motion for Entry of Default Judgment because they had not received notice. Moreover, no order was entered on that date and no order was served on Sol nor appears in the court file. Furthermore, the Green family was led to believe that the October 3, 1989 hearing was scheduled to address the issues of the judgment and the citation to discover assets. A default judgment (the "Illinois Default Judgment") was entered on September 21, 1989, by Judge Thomas P. Quinn against Sol Green in the amount of $84,955.19, with post-judgment interest in the amount of $7,420.08 for a total judgment amount of $95,195.27, plus costs of suit (RC.49). (App. D at 21a).

Neither Sol, Claire Fischer or any other member of the Green family was ever served with a copy of the Illinois Default Judgment (RC. 681). Claire, not knowing what had transpired on September 21, 1989, appeared at the October 3, 1989, hearing on the Citation to Discover Assets which had previously been scheduled. (RC. 681). At the October 3, 1989 hearing, the lawyer from Cantwell advised the court that the Rule to Show Cause had not been served upon Sol Green and he asked for a continuance (RC. 681). The Court ordered that an alias rule to show cause should issue and continued the matter until November 7, 1989. By November 7, 1989, the thirty-day clock for vacating the Illinois Default Judgment would have run.

Claire Fischer also appeared at the November 7, 1989 hearing on behalf of Sol Green. At that time, the court, at

the request of Cantwell, continued the matter until December 8, 1989. When the Cantwell attorney drafted the Order relating to this hearing, he indicated that Sol Green's attorney had requested the continuance; however, Sol Green had never retained an attorney during this period. (RC. 682).

On November 7, 1989, Merrill Lynch issued a Citation to Discover Assets directed at Mrs. Green. (RC. 682). The citation examination of Mrs. Green was held on March 8, 1990. During that proceeding, Mrs. Green was shown a document on which the purported signature of Sol Green appeared and was asked if that was his signature. Mrs. Green stated that the signature was definitely *not Sol's signature*; and, despite her requests, Merrill Lynch refused to produce any receipts indicating that Sol Green ever used the subject credit card. (RC. 10). Mrs. Green also informed counsel for Merrill Lynch that Sol Green had never lived in California, had never worked in California, and was never indebted to Merrill Lynch. In response, an attorney from Cantwell told Mrs. Green not to worry because Sol Green was dead (RC. 10).

At the conclusion of that proceeding, the court entered an order dismissing the proceeding on the condition that Mrs. Green produce a copy of the 1987 and 1988 federal and state tax returns, which she and Sol had filed, as well as other financial documentation. These tax returns were subsequently tendered to Defendants and the action was dismissed.

III. Enforcement of the Illinois Default Judgment

On January 9, 1992, more than two years after entry of default in Illinois, Cantwell, on behalf of Merrill Lynch, filed a Motion to Set Aside a purported fraudulent conveyance of the Green residence from Sol Green to Mrs. Green and grant turnover of the Green residence. (Complaint ¶33, RC. 11) During these proceedings, Judge Irwin Cohen did not permit Mrs. Green, though she tried, to challenge the validity of the California Default Judgment or its registration in Illinois:

> I judicially noticed the fact the entry was in California, the fact it was registered there, the fact it was filed here, or challenged here, those are not issues. They are all gone. The only thing of any matter now that is new and the only thing I am going to consider in reference to this is two items, and whether it is a red herring or not, I am not concerned about it.

(RC. 712). On April 13, 1993, Judge Cohen entered an order granting Merrill Lynch's motion (Complaint ¶¶33 and 36, RC. 12 and 75).

In the interim, on January 8, 1993, Robert Fischer, as administrator of the Estate of Sol Green, filed a complaint in California to set aside the underlying default judgment (RC. 214-220). That action was dismissed by Judge Haden on purely procedural grounds (for failure to attend a case management conference) on August 13, 1993 (RC. 223). The Green family was unable to continue with that California action due to their inability to afford to retain counsel and litigate that action thousands of miles away.

On October 5, 1993, the beneficial interest held by Mrs. Green in the Green residence was sold in accordance with a court ordered judicial sale to Merrill Lynch for $90,000 (Complaint ¶37; RC. 12 and 56). On November 5, 1993, an order was entered confirming the sale of the Green residence. (RC. 853).

In April 1997, Mrs. Green filed her three-count Complaint. On April 20, 2000, the Appellate Court affirmed the trial court's dismissal of the Complaint on grounds of *res judicata*, collateral estoppel and statute of limitations. On January 29, 2001, the Illinois Supreme Court denied petitioner's timely petition for leave to appeal.[2]

REASONS FOR GRANTING THE WRIT

This case presents an important question as to whether the three-prong due process standard for challenging the constitutionality of punitive damage awards, as expressed in *BMW v. Gore*, 517 U.S. 559 (1996), may be asserted to collaterally challenge the enforcement of a facially invalid $50,000 punitive award on $4,000 of alleged actual damages, where such judgment was obtained by default on forged documents in California state court against an elderly and poor resident of Illinois by the judgment creditor, a global financial services firm, which then enforced that default judgment against the Illinois resident by taking her home and asserting that res judicata and full faith and credit precludes the person's collateral challenge to the underlying judgment, ignoring that she lacked the financial resources to defend in California.

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2. Given the lower courts' failure to address the invalidity and unconstitutionality of the California default judgment, the lower courts' grounds for dismissal are not valid or a bar to the relief Petitioner seeks here.

This case thus starkly presents the factual record missing from *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (December 11, 2000), in which this court recently declined to permit a consumer's collateral challenge to an agreement to arbitrate, because the record there failed to meet the burden of showing that arbitration there was prohibitively expensive, effectively constituting a denial of due process. 121 U.S. at 522-523.

Here, in contrast, the distant California state court proceedings in which Merrill Lynch sought and obtained a default judgment against the Illinois resident not only for the alleged $4,000 actual damages on the credit card, but, additionally by default, $50,000 in punitive damages, in violation of *Gore* as well as California law, because the Illinois resident defendant lacked the resources to defend the distant case, is precisely the denial of due process which should support an exception to Art. 4, § 1's full faith and credit obligation on the state courts.

The law in this area is basic hornbook. Before the full faith and credit clause can become operative, one must have had his day in court, since it is the essence of "due process of law" that one must be given an opportunity to be heard. *Pink v. A.A.A. Highway Express*, 191 Ga. 502, 13 S.E.2d 337, (1941), *affirmed*, 314 U.S. 201 (1941), *reh. den.*, 314 U.S. 716 (1942). In *BMW v. Gore*, 517 U.S. 559 (1996) this court held that due process precludes punitive damages which do not meet a 3-prong test, evaluating the punitive damage award based on: 1-the degree of defendant's reprehensibility, 2-the ratio of the punitive award to actual/compensatory damages (generally permitting no more than 3 or 4-times actual damages), and 3-a comparison to civil and criminal penalties otherwise imposed on such conduct. Here, the punitive damages on their face violated *Gore* (petitioner, the

defaulting alleged signer for a credit card had no culpability for any of the charges and could not afford to appear in California, the award was 12.5 times the $4,000 alleged actual damages, and there are no "penalties" imposable on a consumer debtor under the law of the forum, California, beyond his obligation to make good for the principal), and were exacerbated by the fact that they were entered by default.

Thus, this case is the factual situation appropriate for this Court to weigh in with the holding that a punitive damage award obtained in a far-away jurisdiction which on its face violates *Gore,* can be challenged collaterally over assertions of res judicata and full faith and credit.

In affording the California Default Judgment full faith and credit the Illinois Appellate Courts blindly accepted the two default rulings rendered in the prior proceedings and ignored their duty to void judgments which are invalid or unconstitutional on their face.

I. The Invalidity of the California Default Judgment

The use of distantly obtained judgments with inadequate process and registration, and facially invalid punitive damage awards are not entitled to full faith and credit or *res judicata* effect against Illinois consumers. Mrs. Green, an 82 year old widow, is faced with losing her house of almost 50 years as well as her right to have her case heard on the merits. Given these dire consequences, it is imperative that this Court do what the lower courts have thus far failed to do — allow an evidentiary determination of the validity of the California Default Judgment and its registration, also by default, in Illinois.

The Illinois Courts gave the California Default Judgment full, faith and credit as if there was no other option available to them. However, it is well known in Illinois that "void judgments are always subject to collateral attack for lack of jurisdiction or fraud." *Miller v. Balfour*, 303 Ill.App.3d 209, 215, 707 N.E.2d 759, 764 (2d Dist. 1999) (*citing*, *In re Marriage of Verdung*, 162 Ill.App.3d 374, 389-90, 515 N.E.2d 454 (1987)). Furthermore, void judgments "may be attacked at any time or in any court, either directly or collaterally". *Evans v. Corporate Services*, 207 Ill.App.3d 297, 302, 565 N.E.2d 724 (2d Dist. 1990). This Court also allows collateral attacks on invalid state court judgments or those that violate due process rights. *See Gore*, 517 U.S. 559 (1996); and *Kalb v. Feurstein, et ux.*, 308 U.S. 433 (1940) (allowing collateral attack on state court foreclosure proceeding; reversing dismissal of action seeking restoration of possession of farm lost in a state court foreclosure proceeding because the state action did not comport with federal law).

The record here shows that at the time the California Default Judgment was entered Merrill Lynch had knowledge that Sol Green was not a resident of California (Complaint ¶20, RC.8), had resigned from Moving Up approximately one year prior to the subject accounts being open (Complaint ¶21, RC.8) and that the purported signature of Sol Green written on the account agreements was placed there without Sol Green's knowledge or authorization. (Complaint ¶14, RC.6).

Additionally, Defendants' registration of the California Default Judgment was also improper and could even be characterized as fraudulent. Under Illinois law, pursuit of a Citation to Discover Assets, a supplemental proceeding, before a judgment has been entered is now, and was then in

1989, not allowed. 735 ILCS § 5/2-1402 (formerly, IL ST CH 110 P 2-1402) ("procedure for conducting supplementary proceedings shall be prescribed by rules"). Supreme Court Rule 277 states: "a supplementary proceeding . . . may be commenced . . . [when] a judgment is . . . subject to enforcement"; *see also Pyshos v. Heart-Land Development Company*, 258 Ill.App.3d 618, 622, 630 N.E.2d 1054, 1057 (1st Dist. 1994) ("[s]upplementary proceedings may only be initiated after a judgment has been entered"); and *State Bank of Piper City v. A-Way, Inc.*, 135 Ill.App.3d 1010, 1015, 482 N.E.2d 620, 624 (3d Dist. 1985) (section 2-1402 proceedings are unavailable to creditors, secured or otherwise, until after judgment capable of enforcement has first been entered in their favor"). Here, Defendants initiated the Citation to Discover Assets proceeding almost two months **prior** to the entry of the California Default Judgment. Not only did Defendants violate Illinois Supreme Court Rule 277 in 1989, but they intentionally misled the lower court into believing that such a process was appropriate. (RC. 64-65). Defendant's violation of, among other things, the rule against filing supplemental proceedings before entry of the Illinois judgment, and their subsequent misstatement to the lower court covering up their violation, had a devastating impact on Petitioner, resulting in the sale of her home, which is deserving of a remedy.

The lower courts' refusal to review the underlying facts in this case should not deter this Court from doing so now. The record here shows that service on Sol Green in California was not proper (Complaint ¶¶19-21, RC.8-9) and, thus, the California court did not have jurisdiction over him. Moreover, Defendants' improper registration of the California Default Judgment in Illinois, also by default, and the Illinois courts' reliance on that judgment being valid,

calls into question its validity in that forum also. And, unlike the facts presented in *Green Tree*, the record here supports rendering the California Default Judgment invalid because the costs associated with being forced to litigate in a far-away forum precluded Petitioner from vindicating her legal rights.

II. The Unconstitutionality of the California Default Judgment

The Illinois courts also completely ignored the fact that the California Default Judgment contained an award of $50,000 in punitive damages, $20,000 of a purely corporate debt and some $10,000 in attorney fees and costs, on essentially a $4,000 credit card claim. In blindly affording the California Default Judgment full, faith and credit, the lower courts failed to make any due process analysis required by *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), nor did they inquire at all into the basis for such an excessive punitive damage award relative to the underlying obligation. Ignoring the "degree of reprehensibility" prong, the Illinois court never permitted any assertion that Sol Green's conduct, even as alleged in the California suit, could support a punitive damage award. Even if the validity of Mr. Green's alleged signature was not challenged, it is difficult to envision how a mere obligation to pay on a credit card default could ever constitute "reprehensible" conduct permitting a punitive damage award. Nor are there any penalties for such conduct-failing Gore's third prong. Most troubling is the obvious disproportionality of the punitive damages at 12.5-times-alleged actual damages. The excessive award of punitive damages assessed against Petitioner, which has resulted in the judicial sale of her home of almost 50 years to Merrill Lynch, grossly violates her right to due process.

As stated in *Gore*, punitive damages may be imposed to "punish unlawful conduct and deter its repetition". *Id.* at 568. But here, the complaint filed against Sol Green in California did not allege any allegation of improper conduct. All assertions against Sol Green, except for his purported signature on the account agreement, were alleged on information and belief.

As recognized by Judge Hogan below, Merrill Lynch's claim against Sol Green was only for $4,000 arising essentially from a breach of a credit card agreement. To award $50,000 in punitive damages against a breach of contract claim and to tack on the $20,450 corporate claim, without even considering the additional approximately $10,000 in attorney fees and other costs, is not only a violation of Petitioner's due process rights under the holding in *Gore*, but is also a violation of California law, the jurisdiction that rendered the default judgment. *Cates Construction, Inc. v. Talbot Partners*, 980 P.2d 407, 427 ("absent an independent tort, punitive damages are not recoverable for breach of contract"). Therefore the Petitioner should have been afforded the opportunity to challenge the validity of the default judgment being enforced.

In order to provide fundamental due process protection for consumers nationwide against such creditor abuses, the Court should grant the petition and declare the appropriate due process limitations on full faith and credit.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to the Illinois Appellate Court, so that the judgment of the appellate court may be reviewed and reversed with instructions to vacate the judicial sale of petitioner's home to respondent Merrill Lynch Pierce Fenner and Smith.

Respectfully submitted,

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